PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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No. 06-886

In The

Supreme Court of the United States

SHERMAN AUSTIN,

Petitioner,

v.

MICHIGAN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Michigan

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether dying declarations are an exception to the rule of *Crawford v. Washington*, 541 U.S. 36 (2004), and whether federal and state courts across the nation have improperly read this Court's dicta in *Crawford* regarding dying declarations to preclude their admission.

Whether a court may recognize a Fifth Amendment privilege against self-incrimination for a witness where the proposed questions could not have yielded incriminating answers, particularly where the testimony implicates a defendant's constitutional right to present a defense, as in this case where the witness was specially situated to rebut the claims of a jailhouse informant that the Defendant had confessed to the crime?

Whether a trial court may preclude all testimony of a witness based on the theory that a party cannot call a witness who intends to invoke his Fifth Amendment privilege or whether the trial court should require the witness to invoke his privilege on a question-by-question basis?

Was Defendant denied his constitutional right to a fair trial where the prosecutor engaged in improper, argumentative cross-examination of him and then gave a closing argument that improperly denigrated Defendant and defense counsel?

Was Defendant denied his constitutional right to the effective assistance of counsel where his trial attorney failed to object to the introduction of Decedent's hearsay statements, the prosecutor's improper cross-examination, and the prosecutor's improper closing argument?

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The opinion of the Michigan Court of Appeals affirming Petitioner's conviction dated December 15, 2005 (App. 1-14) is unpublished. The order of the Michigan Supreme Court denying Petitioner leave to appeal dated September 27, 2006 (App. 15) is unpublished.

JURISDICTION

The Michigan Supreme Court order was entered on September 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fourteenth Amendment, United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In June 2004, Defendant-Petitioner, Sherman Austin, was tried by a jury in the Circuit Court for Wayne County, Michigan, before the Honorable Paul S. Teranes on a charge of first-degree murder (M.C.L. §750.316(1)(a)) and felony firearm (M.C.L. §750.227b). The jury found Mr. Austin guilty on both counts. The trial court sentenced Mr. Austin to two years' imprisonment on the felony firearm

conviction and a life sentence on the first-degree murder conviction.

The charges against Mr. Austin arose based on allegations that he shot and killed Earl Bowen. Mr. Bowen was shot at approximately 5:30 a.m. on April 20, 2001, as he was getting in his car to go to work. Mr. Bowen, a one-time informant for the ATF who had been offered federal protection, had been shot under nearly identical circumstances approximately eight months earlier and survived. Mr. Austin was not a suspect in that shooting. Mr. Bowen was Mr. Austin's daughter's boyfriend, and the prosecution argued that Mr. Austin shot him because he had physically assaulted his daughter. The defense argued that Mr. Austin was not the shooter and that the most likely suspect was the unknown party who had previously shot Mr. Bowen. After having initially declined to issue a warrant for Mr. Austin's arrest in 2001, the prosecution reversed its decision approximately two years later after the case was reopened by the Detroit Police Department cold case unit. No new evidence was available at that time; however, subsequent to Mr. Austin's arrest, a jailhouse informant claimed and later testified at trial that Mr. Austin confessed to him.

Mr. Austin was tried in June 2004. There were only two pieces of evidence against Mr. Austin: (1) the alleged dying declaration of the victim, Earl Bowen, and (2) the allegation of a jailhouse informant that Mr. Austin had confessed his culpability for the shooting of Mr. Bowen. Mr. Austin testified at trial that he did not shoot Mr. Bowen.

The alleged dying declarations of Mr. Bowen were introduced through two different witnesses. Monica

Bowen, Mr. Bowen's cousin, testified that Mr. Bowen had been living with her for about three weeks when, on April 20, 2001, she was woken by gun shots in the early morning. T II 275-78.[1] She heard Mr. Bowen calling her from outside, telling her that he could not talk and that his leg was going numb. T II 282. Ms. Bowen called 911. T II 280. After some initial questions regarding the situation at the scene, the 911 operator kept asking Ms. Bowen to ask Mr. Bowen who shot him, and Mr. Bowen finally said, "Toya's daddy." T II 294-95. "Toya" was Mr. Bowen's girlfriend, Shatoya Austin, and was also Mr. Austin's daughter. T II 295.

The second witness to testify regarding Mr. Bowen's alleged dying declarations was Detroit Police Officer Khary Mason. T III 52. Officer Mason responded to a dispatch regarding the shooting and observed Mr. Bowen lying on the ground when he arrived. T III 53. Mr. Bowen had two holes in his upper chest and had difficulty talking. T III 54. Officer Mason asked him who shot him, and Mr. Bowen tried to respond, but Officer Mason could not understand him. T III 54-55. He accompanied Mr. Bowen to the hospital with EMS. T III 55. Officer Mason continued to question Mr. Bowen, and Mr. Bowen said that Sherman Austin had shot him. T III 57-58.

These alleged dying declarations were available to the prosecution in 2001, but there was no other evidence, either physical or testimonial, linking Mr. Austin to the

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[1] References to the trial transcript are designated throughout this petition as follows, "TII" refers to Jury Trial Transcript dated June 3, 2004; "TIII" refers to Jury Trial Transcript dated June 7, 2004; "TIV" refers to Jury Trial Transcript dated June 8, 2004; and "TV" refers to Jury Trial Transcript dated June 9, 2004.

shooting. Therefore, the government did not pursue prosecution against Mr. Austin. Later, the file was re-opened by the Detroit Police Department cold case unit and Mr. Austin was arrested. While Mr. Austin was in the Wayne County jail, the government located another inmate, Derrick Green, who would testify that Mr. Austin told him that he killed Mr. Bowen. T III 79. Mr. Green was in jail pending sentence on a murder case. T III 76. The defense proposed to called Donald DeShazo to rebut and undermine the credibility of Mr. Green. Mr. DeShazo would testify that he saw Mr. Green reading Mr. Austin's discovery materials in his cell, this explaining how Mr. Green had information about Mr. Austin's case. Mr. DeShazo was awaiting trial on unrelated charges, and one of the witnesses against him was a jailhouse informant. The prosecution proposed to question Mr. DeShazo about his prejudice against jailhouse informants in general. Counsel for Mr. DeShazo claimed that any inquiry about Mr. DeShazo's case – even about the mere fact that he was charged – would justify assertion of Mr. DeShazo's Fifth Amendment privilege. The trial court agreed and precluded all of Mr. DeShazo's testimony. T III 3-22 (App. 16-33).

The jury convicted Mr. Austin, and the trial court sentenced him to life in prison on the murder conviction. Mr. Austin timely appealed by right. The Michigan Court of Appeals affirmed his conviction in a divided opinion. (App. 1-14). Mr. Austin timely sought leave to appeal to the Michigan Supreme Court, but the Michigan Supreme Court denied leave in an order dated September 27, 2006. (App. 15). Mr. Austin now prays that this Court issue a writ of certiorari to the Michigan Supreme Court.

REASONS FOR GRANTING THE PETITION

Dying Declarations under *Crawford v. Washington*

In *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 777 (2004), this Court examined the historical background of the Sixth Amendment's Confrontation Clause and observed that "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." *Id.* at 1365. In *Crawford*, this Court stated in a footnote that there may have been an exception at common law for dying declarations to the general prohibition against admission of testimonial statements against the accused in a criminal case. In noting the possibility, this Court stated, "We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*." *Id.* at 1367 n. 6.

This Court in *Crawford* did *not* delineate an exception to the confrontation right for dying declarations. This Court left open the possibility that future litigants could arguably make the case for such an exception, but the proposed exception was not part of this Court's holding. *See, e.g., Illinois v. Gilmore*, 356 Ill. App. 3d 1023, 1032, 828 N.E.2d 293, 332 (2005) and *Rhode Island v. Feliciano*, 901 A.2d 631, 640 (2006) (noting that the dying declaration footnote was dicta, not part of this Court's holding).

Unfortunately, lower courts throughout the nation have taken this Court's footnote regarding dying declarations as dispositive. Whether or not such an exception exists, courts have cited the *Crawford* footnote in justifying admission of

dying declarations. *See, e.g., Wallace v. Indiana*, 836 N.E.2d 985 (Ind. Ct. App. 2005) ("[W]e are convinced that *Crawford* neither explicitly, nor impliedly, signaled that the dying declaration exception to hearsay ran afoul of an accused [sic] right of confrontation under the Sixth Amendment."); *Ohio v. Nix*, No. C-030696, 2004 WL 2315035 (Ohio App. 1 Dist. 2004) (referring to the footnote in *Crawford*, finding that Crawford did not intend to affect the dying declaration exception).

Some courts have disagreed and held that there is no exception under *Crawford* for dying declarations. *See, e.g., United States v. Mayhew*, 380 F. Supp. 2d 961, 965-66 (S.D. Ohio 2005); *United States v. Jordan*, 66 Fed. R. Evid. Serv. 790 (D. Co. 2005). Finally, some courts have precluded admission of dying declarations not as an exception to the Confrontation Clause, but under a forfeiture theory. *See, e.g., Mayhew*, 280 F. Supp. 2d 961; *Kansas v. Meeks*, 277 Kan. 609, 88 P.3d 789 (2004).

In sum, the status of dying declarations under *Crawford* is unsettled. There are disagreements in the lower courts about the existence of an exception and the applicability of the forfeiture doctrine.

There is another question surrounding this issue. This Court in *Crawford* stated in dicta that there is historical authority for admitting even testimonial dying declarations in a criminal case. There is legitimate question about the historicity of this claim. For instance, Professor Michael Polelle of the John Marshall School of Law at Loyola University of Chicago has argued that, *contra* the *Crawford* footnote, there were more exceptions under the common law than for dying declarations only. Michael Polelle, *The Death of Dying Declarations in a Post-*Crawford *World*,

Mo. L. Rev. 285 (Spring 2006). Prof. Polelle specifically points out that one of the sources cited in the *Crawford* footnote in support of the proposition that dying declarations were the only criminal hearsay exception at common law does *not*, in fact, support this proposition. *Id.* at 291 n. 33. The historicity of the dying declarations exception and its uniqueness at common law at the time of the adoption of the Sixth Amendment, as well as the meaning of the historical record on interpretation of the Confrontation Clause, should be fully addressed by this Court, rather than left to the brief *Crawford* footnote analysis.

Mr. Austin's case provides this Court a straightforward case for resolving these issues. In the case against Mr. Austin, there were two alleged dying declarations admitted against him. First, the statement by Mr. Bowen and second, the statement given to Officer Mason in the emergency room.[2] There was only one other piece of evidence against Mr. Austin: the testimony of the jailhouse informant. If this Court were to accept Mr. Austin's case for review, it could resolve whether dying declarations fall within the *Crawford* rule, whether there is a historical exception under *Crawford* for these statements, and whether a forfeiture doctrine applies to these statements.

The Proper Standard for Assessing the Validity of an Asserted Fifth Amendment Privilege

This Court should also consider granting a writ on the proper standard for assessing the validity of the assertion of a Fifth Amendment privilege. One of the key prosecution

[2] For the purposes of this section, Defendant assumes, *arguendo*, that the statements were actually made as alleged by the prosecution.

witnesses against Mr. Austin was Derrick Green, a jailhouse informant who testified that Mr. Austin confessed to him while both were awaiting trial in the Wayne County Jail. In order to rebut this testimony, Mr. Austin attempted to call at trial Donald DeShazo to testify that he had seen Mr. Green rifling through Mr. Austin's discovery in his cell which accounted for Mr. Green's knowledge of the case against Mr. Austin. TIII 3-22 (App. 16-31).

The prosecutor stated on the record that he planned to question Mr. DeShazo regarding the bare fact that he was charged with crime, and the fact that a portion of the evidence against Mr. DeShazo consisted of the testimony of a jailhouse informant. *See* TIII 5-6, 8-10, 12. The prosecution did not indicate any intention to inquire regarding the facts surrounding Mr. DeShazo's charges or Mr. DeShazo's defenses to the charges. In fact, the prosecution took the position that the proposed questions could *not* yield incriminating answers and, therefore, Mr. DeShazo did not have a valid Fifth Amendment privilege under the circumstances. *See* TIII 6, 12.

Counsel for Mr. DeShazo argued that any questions regarding the charges pending against Mr. DeShazo – even the most innocuous question about whether Mr. DeShazo knew that he was charged with a crime – would justify Mr. DeShazo's assertion of his Fifth Amendment privilege against self-incrimination. *See* TIII 11. The trial court, over objection, ultimately agreed with counsel for Mr. DeShazo, holding that (1) the proposed inquiries were relevant to prove Mr. DeShazo's bias, (2) any inquiries whatsoever regarding the charges against Mr. DeShazo – even the bare fact of the existence of the charges – would justify Mr. DeShazo's assertion of the privilege, and (3) because, according to the court's holding, Mr. DeShazo

possessed a valid Fifth Amendment privilege, the defense could not call him to testify at all. *See* TIII 14-17.

The trial court made two errors in its holding. First, it erred in finding that Mr. DeShazo had a valid Fifth Amendment privilege regarding the proposed questions of the prosecution. Second, even assuming that Mr. DeShazo did have a valid privilege, the trial court erred in excluding all of Mr. DeShazo's testimony rather than permitting him to testify regarding other relevant matters and invoking his Fifth Amendment privilege on a question-by-question basis (*see* next section for a discussion of this second error).

This Court has held that "[t]he Fifth Amendment prohibits only compelled testimony that is incriminating." *Hiibel v. Sixth Judicial District Court of Nevada, Humboldt County*, 542 U.S. 177 (2004) (citing *Brown v. Walker*, 161 U.S. 591, 598 (1896) (noting that where "the answer of the witness will not directly show his infamy, but only tend to disgrace him, he is bound to answer")). The court must evaluate the assertion and extend its protection only to those witnesses who have "reasonable cause to apprehend danger from a direct answer." *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

In this case, there was no reasonable probability of a direct answer by Mr. DeShazo to the proposed questions of the prosecution that would have tended to incriminate him. Mr. DeShazo's testimony regarding his knowledge of the fact that he was charged with a crime had no tendency to prove the truth or falsity of the charges. Likewise, Mr. DeShazo's testimony regarding the fact that the prosecution intended to introduce the testimony of a jailhouse informant against him could in no way constitute an

admission by Mr. DeShazo to the truth of the informant's allegations. The prosecution was quite clear in its argument on this issue that it did not intend to question Mr. DeShazo beyond these innocuous and preliminary inquiries. The prosecution did not intend to inquire regarding the facts surrounding the incident that formed the basis of the charge against Mr. DeShazo nor did it intend to ask Mr. DeShazo to comment on the accuracy or credibility of the evidence. The prosecution simply and exclusively sought to confirm Mr. DeShazo's awareness of the charges against him and awareness of the nature of a portion of the evidence against him. The prosecution then intended to use this information to argue about Mr. DeShazo's alleged bias to testify on Mr. Austin's behalf.

Not only was the trial court's holding improper under Fifth Amendment jurisprudence, the holding also violated Mr. Austin's constitutional right to present a defense. U.S. Const. amends. V, VI, & XIV; *Washington v. Texas*, 388 U.S. 14 (1967).

> The right to offer testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as the accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a *fundamental* element of due process of law.

Washington, 388 U.S. at 19.

In no way should the trial court have prevented legitimate direct examination of Mr. DeShazo because of

the prosecution's proposed cross-examination on collateral matters. In *United States v. Esparsen*, 930 F.2d 1461, 1469 (10th Cir. 1991), the court held that when a witness invokes his Fifth Amendment privilege regarding collateral matters on cross-examination, the trial court should not strike the witness's testimony:

> Courts have balanced [the competing concerns of the right to present witnesses with the goal of eliciting the truth on cross examination] by drawing a line between direct and collateral matters. . . . When the refusal to answer cross examination questions involves collateral matters, we have held in the analogous situation of a prosecution witness who invokes the fifth amendment that the testimony should not be struck.

In Mr. Austin's case, the proposed inquiry had nothing to do with the facts surrounding Mr. Austin's charges. Rather, the prosecution's proposed cross-examination questions regarded credibility inquiries and collateral matters related to another crime.

In sum, there was no legitimate basis in the law to recognize Mr. DeShazo's assertion of privilege and significant constitutional and other legal bases to, in fact, require Mr. DeShazo to testify. Given the fact that there were only two pieces of evidence against Mr. Austin, one of which was Mr. Green's testimony, the trial court substantially prejudiced Mr. Austin by preventing him from presenting the testimony of Mr. DeShazo. This error, if left uncorrected, is a manifest injustice to Mr. Austin and stands as erroneous precedent for the application of the Fifth Amendment privilege.

Invoking the Fifth Amendment on a Question-by-Question Basis

Mr. Austin's case also presents this Court the opportunity to correct a facile misunderstanding of the procedure for calling a witness to testify who intends to invoke his Fifth Amendment privilege against self-incrimination. Most law students learn the rule that a party may not call a witness who intends to invoke his Fifth Amendment privilege. The Michigan Court of Appeals in Mr. Austin's case disposed of his Fifth Amendment issue with this one-sentence aphorism ("A lawyer may not knowingly call a witness when he is aware that the witness will claim a valid privilege not to testify."). (App. 3). The American Bar Association has perpetuated this misunderstanding of the law of privilege in promulgating its standards for prosecution and defense counsel, stating without qualification that "[C]ounsel should not call a witness in the presence of the jury who the lawyer knows will claim a valid privilege not to testify." ABA Standards for Criminal Justice: Prosecution and Defense Function, Defense Function Standard 4-7.6 and Prosecution Function Standard 3-5.7.

The true state of the law surrounding an assertion of the Fifth Amendment privilege is more complex than the Michigan courts recognized in Mr. Austin's case. Witnesses in civil and criminal proceedings have a right under the Fifth Amendment to not give testimony if the witness has reasonable cause to apprehend a real danger of incrimination. Assertion of the privilege should be question-by-question rather than in blanket fashion. *United States v. Mandugano*, 425 U.S. 564; 575 (1976): "Absent a claim of the privilege, the duty to give testimony remains absolute. The stage is therefore set when the question is asked."

(citing *Hoffman v. United States*, 341 U.S. 479, 486-487 (1951)).

While a defendant on trial may refuse to testify, a witness is not allowed to make a "blanket assertion" of the privilege of self-incrimination and refuse to answer any questions, without at least a diligent inquiry by the Court. *United States v. Goodwin*, 625 F.2d 693, 701 (5th Cir. 1980).

In the event that a witness asserts the privilege, the trial court must make "a particularized inquiry, deciding, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded." *Goodwin*, 625 F.2d 693 (5th Cir. 1980); *United States v. Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976); *United States v. Tsui*, 646 F.2d 365, 367 (9th Cir. 1981). As the Sixth Circuit explained in *In re Morganroth*, 718 F.2d 161, 167 (6th Cir. 1983):

> Before a witness, such as Morganroth, is entitled to remain silent, there must be a valid assertion of the fifth amendment privilege. It is for the court to decide whether a witness' silence is justified and to require him to answer if it clearly appears to the court that the witness asserting the privilege is mistaken as to its validity. A valid assertion of the fifth amendment privilege exists where a witness has reasonable cause to apprehend a real danger of incrimination. A witness must, however, show a "real danger," and not a mere imaginary, remote or speculative possibility of prosecution. While the privilege is to be accorded liberal application, the court may order a witness to answer if it clearly appears that he is mistaken as to the justification for the privilege in advancing his claim as a subterfuge. A blanket

> assertion of the privilege by a witness is not sufficient to meet the reasonable cause requirement and the privilege cannot be claimed in advance of the questions. **The privilege must be asserted by a witness with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify.**

(citations omitted) (emphasis added). Even though a witness may have a valid claim of privilege with respect to some questions, the scope of that privilege may not extend to all relevant questions. The witness may be totally excused only if the court finds that he could "legitimately refuse to answer essentially all relevant questions." *United States v. Gomez-Rojas*, 507 F.2d 1213, 1220 (5th Cir. 1975); *Goodwin*, 625 F.2d at 701; *Tsui*, 646 F.2d at 368; *United States v. Klinger*, 128 F.3d 705, 709-710 (9th Cir. 1997). A trial judge "must inquire whether there are questions which can be answered without forcing the witness to invoke the privilege." *Tsui*, 646 F.2d at 367; *United States v. Sanders*, 591 F.2d 1293, 1298 n. 9 (9th Cir. 1979).

Even when a trial court is satisfied that a witness has a valid right to remain silent with regard to some issues, the court must permit inquiry to determine whether there are other issues as to which the witness would not be able to assert the privilege. *Tsui*, 646 F.2d at 367; *Goodwin*, 625 F.2d at 701.

The court in Mr. Austin's case erred by failing to follow the proper procedure. While a trial court may sustain a refusal to testify if the court, based on its knowledge of the case and of the testimony expected from the witness, can conclude that the witness could "legitimately

refuse to answer all relevant questions", *Goodwin*, 625 F.2d at 701, the trial court here did not consider allowing Mr. DeShazo to testify and determine the privilege issue question-by-question, but sustained the blanket assertion of privilege. The court was not in a position to say that any response to all possible questions would tend to incriminate him. The questions defense counsel wanted to ask him would have evoked non-incriminating answers totally unrelated to his pending charges. Even assuming that the questions that the prosecution proposed to ask on cross-examination could have incriminated Mr. DeShazo, the prosecution would still have had a wide range of relevant and probative questions regarding Mr. DeShazo's testimony that would not have been subject to the privilege. Given that the allegedly potentially incriminating inquiries formed a small subset of the possible relevant inquiries, the trial court erred in granting Mr. DeShazo a blanket privilege and excusing him from testifying.

The Misconduct of the Prosecution During Trial

Mr. Austin also prays that this Court grant a writ of certiorari to consider whether the prosecution denied him a fair trial by its pervasive misconduct during cross-examination and closing argument.

In this case, the prosecutor engaged in a concerted course of action to deny Mr. Austin's right to a fair trial. During cross-examination of Mr. Austin, the prosecutor improperly argued with him and requested that he comment on and characterize the testimony of prosecution witnesses.

Prosecutor asked Mr. Austin to comment on whether investigating Agent Yott was a liar (TIV 124):

Q: You heard Sergeant Yott testify that you had a fist fight with Earl?

A: I most certainly heard him.

Q: So Sergeant Yott lied about that?

A: He's a liar.

Mr. Austin testified about having records demonstrating that he moved in with his girlfriend, Ms. Simpson, on April 11, and the prosecutor argued with him and accused him of not having them to prove what he was saying (TIV 127-28):

Q: And when did you move in with Miss Simpson?

A: April 11th, 2001.

Q: April 11th, 2001. You remember that date?

A: Oh, yeah.

Q: Why do you remember that date so well?

A: Because I paid the cable bills in my name, the light bills in my name. We had rent to own furniture that was in my name. I basically furnished everything. So, you know, I keep a file on my bills and stuff. I always keep receipts and stuff.

Q: Didn't Edison have to come through that lady that brought it today?

A: Well, I mean I already had copies of it.

Q: Oh, you already had copies of it?

A: I have copies of my bills.

Q: Do you have copies of your cable bill?

A: Yeah.

Q: Where are they?

A: Probably put up.

Q: What other bills –

A: (Interposing) I mean I been incarcerated for the last six months. So I don't keep them with me.

Q: What about after April when you – you said you were interviewed, accused of a murder and then discharged?

A: Yes.

Q: So did you go collect the bills and then preserve them in case you were arrested again?

A: They were pretty much well preserved where they were.

Q: So where are they?

A: I mean do you need them now? You never asked me for them.

Q: You don't have them to prove what you're saying, do you?

There was additional argument about discovery that was provided by the prosecution at the last minute (TIV 132-34):

Q: You've been provided with copies of discovery in this case so you can see what [the witnesses who testified at trial] were going to say, right?

A: Well, everything except for the stuff that you gave to my lawyer at the last minute.

Q: Two pages, right?

A: Well, that's not accurate.

DEFENSE COUNSEL: No, that's not an accurate representation –

PROSECUTOR: (Interposing) The problem is Mr. Austin wants to say what he wants because he thinks this is a joke and he's just going to sit up there and say what he wants and not even respond to my question.

THE COURT: Just a moment. I can presume there's an objection.

DEFENSE COUNSEL: Absolutely. I object.

THE COURT: What's the objection?

DEFENSE COUNSEL: My objection is to the representation that since the start of trial there have been two pages of unknown discovery up until now provided to the defense. It's more like 400 pages.

THE COURT: The witness is on the stand. Both of you gentlemen are testifying right now. So the jury should disregard that. [The prosecutor] asked the witness about how many pages he may

have seen, [defense counsel] showed him, or turned over to him.

DEFENSE COUNSEL: Thank you.

THE COURT: [Defense counsel's] standing argument which is improper, it's also misleading to the jury.

Q: Mr. Austin, would it be fair to say that the majority of paperwork that was just given to your attorney is in regard to your employment at the ministry, at the mission?

A: I didn't see it. I don't know.

Q: You didn't see these copies from these brown folders?

A: Not all that you have in your hand, I didn't see that.

Q: But you said you already know the story about the three days and the firing?

A: Because I worked there. I would know.

PROSECUTOR: There were two police reports that were not turned over that [defense counsel] was given. This cannot stand in front of this jury. When he gets up here and says 400 pages when he knows darn well it's all over this junk.

THE COURT: Mr. [Prosecutor], you know this is improper argument. We're getting into what discovery. That is no issue

> in this case about what was and was not discovered. The issue in this case deal with what this witness knows, not what went on and I would ask the jury to disregard the comments of [the prosecutor] and also the comments of [defense counsel] concerning these issues of what was turned over and what wasn't turned over. The only issue I'll let you go into, Mr. [Prosecutor], is what this witness knows about documents that were turned over that he saw after the trial began or shortly before the trial began.

The prosecutor asked whether Mr. Austin heard the witnesses testify that Mr. Bowen identified him as the killer (TIV 135):

> Q: You're Toya's daddy, correct?
>
> A: Yeah.
>
> Q: You heard Officer Khary Mason testify that he was told by Earl Bowen Sherman Austin shot me, right?
>
> A: Yes.
>
> Q: He also said his baby's mother's father, correct? That's what Mr. Bowen said to Khary Mason, correct? You heard that, right?
>
> A: I don't know if he said that. I heard him say it, but I don't know if it's true or not.

The prosecutor states that he doubted that Mr. Austin was trying to help (TIV 147):

Q: (Interposing) Listen to my questions. I'm sorry, but you got to listen to my questions. You can't just ramble.

A: I'm sorry. I'm just trying to help.

Q: I doubt that, but just listen.

In closing argument, the prosecutor asks him if he heard Ms. Simpson say that she did not mention him being there that night (TIV 156):

Q: It's your testimony that you were at home with your girlfriend Miss Simpson?

A: I was.

Q: Miss Simpson doesn't remember that night. You heard that, right?

A: Yeah, I heard that.

Again, the prosecutor asks Mr. Austin to comment on the testimony of Agent Yott (TIV 160):

Q: So if I understand your testimony correctly, Mr. Austin, Sergeant Yott misrepresented things that occurred; is that correct? I mean they didn't happen the way he said it, right?

A: Well, I don't know what he said. I never seen anything that he ever did.

Q: You heard him testify?

A: I heard his testimony.

In closing argument, the prosecution calls Mr. Austin a liar (TV 14-15):

> PROSECUTOR: Ladies and gentlemen, Mr. Austin's testimony alone shows you he's a liar. It shows you he's a liar. His demeanor, his attitude, his flippant responses. One minute he uses the word latter which is fairly sophisticated use of the English language. The next minute they didn't write it down right because I'm from the city and I speak Ebonics. Mr. Austin is going to try to say whatever he can to get him out of the situation that he's in. He did that on the witness stand and he did that when Special Agent Yott interviewed him.

The prosecutor accuses the defense attorney of being cowardly (TV 42):

> PROSECUTOR: There is no credible evidence in this case to suggest that Khary Mason was nothing but truthful with you when he testified. What have you heard. You've heard baseless allegations. He didn't even ask Khary Mason that. That's the biggest insult. He's going to sit back and say things about Khary Mason and not even have the nerve to confront Khary Mason with that if he's such a liar. That's cowardly.

The prosecutor again accuses Mr. Austin of lying (TV 49):

> PROSECUTOR: You take the evidence with you and you base your verdict on the evidence of all the witnesses or the evidence of one witness, Derrick Green, Khary Mason, or the tape itself and don't forget this man lied to you when he testified.

These questions and statements violated Mr. Austin's right to have a jury consider the credibility of all witnesses at trial; it also improperly distracted the jury from *its* duty to sit as fact-finder when deciding what weight to give to all of the evidence. *See United States v. Sturman*, 951 F.2d 1466, 1479-1480 (6th Cir. 1991) (one witness may not comment on the credibility of another witness). This line of questioning was also inappropriate because it insinuated that Mr. Austin was required to put on a defense, when it is, of course, the prosecution which must rebut the presumption of innocence beyond a reasonable doubt.

It is also improper for the prosecutor to disparage the accused. *Oregon v. Kennedy*, 456 U.S. 667 (1982) (prosecutor called defendant a "crook"). The prosecution went beyond proper comment on the evidence and sunk to commenting on Mr. Austin's character, branding him a liar before the jury. In addition, the prosecutor denigrated defense counsel personally and suggested that defense counsel was attempting to mislead the jury. All of these statements violated the standard as to how a prosecutor should comport himself during trial as set out in *Berger v. United States*, 295 U.S. 78 (1934):

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty

> whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones.

Id. at 88. In the circumstances of this case, the prosecutor's remarks standing alone denied Mr. Austin a fair trial.

Mr. Austin Was Denied His Right to the Effective Assistance of His Attorney

Mr. Austin also asks that this Court grant a writ on the issue of whether he was denied his constitutional right to the effective assistance of an attorney. The accused's state and federal constitutional rights to counsel include the right to the effective assistance of counsel. U.S. Const. amend. VI; *Powell v. Alabama*, 287 U.S. 45 (1932). Attorneys have a duty to keep abreast of controlling changes in the law relevant to their cases. In *Lewandowski v. Makel*, 949 F.2d 884 (6th Cir. 1991), the defendant's attorney misunderstood a recent change in the law and accordingly misadvised the defendant. Lewandowski's trial counsel told him that if he were successful in withdrawing his guilty plea to second-degree murder, the government would not be able to again charge him with the original charge of first-degree murder. There was case law to support counsel's interpretation, but more recent law had rendered that case law inapplicable in Lewandowski's

case. The court held that counsel was ineffective for failing to recognize this change in the law.

In *Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992), the defendant's trial counsel argued that Cave was not guilty of felony murder but argued openly to the jury that he was guilty of armed robbery. Unfortunately for Cave, Florida did not require proof of malice or intent to sustain a conviction of felony murder. In Florida, proof of intent for the underlying felony was sufficient to sustain a felony murder conviction. Cave's counsel, then, had conceded the intent necessary to prove her client guilty of murder. Based on testimony regarding trial counsel's performance on a petition for habeas corpus, the Eleventh Circuit concluded that Cave's attorney "completely misunderstood the law of felony murder" and was ineffective.

The decision in *Crawford* was issued three months before the trial in Mr. Austin's case. The defense bar was well aware that *Crawford* represented a watershed moment in this Court's constitutional and criminal jurisprudence. Reasonably competent and professional criminal defense attorneys would have both known the state of the law and, at trial, interposed timely objections based on *Crawford*. Mr. Austin's trial attorney failed to take these steps, depriving him of the reasonably competent and professional representation required under the Sixth Amendment for the effective assistance of counsel. There could have been no strategic purpose in permitting the introduction of the statements at issue. The introduction of the statements was all downside with no upside. No reasonable attorney would have permitted the introduction or failed to object when admission was sought.

Trial counsel's failure to object to the prosecutor's improper conduct likewise constitutes ineffective assistance of counsel. In *Washington v. Hofbauer*, 228 F.3d 689 (6th Cir. 2000), the Sixth Circuit recently found ineffective assistance of counsel where defense counsel failed to object to prosecutorial misconduct during closing argument. The Court held, "The prosecutor's tactics and challenged statements amounted to unfair and prejudicial misconduct plainly meriting an objection and curative instruction, yet [defense counsel] sat silent . . . [H]is silence was due to incompetence and ignorance of the law rather than as part of a reasonable trial strategy." *Id.* at 703.

In the case at bar, there was absolutely no legitimate reason for the trial attorney's failure to object to all the instances of prosecutorial misconduct. Through his improper actions and arguments, the prosecutor diverted the jury from objectively appraising the evidence. Because the prosecutor's concerted pattern of misconduct successfully resulted in conviction, there was simply no valid defense trial strategy for failing to object. Counsel cannot have a legitimate strategy to permit the prosecution to spread obloquies on the record.

CONCLUSION

Wherefore, Sherman Austin prays that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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2005 WL 3440479

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v SHERMAN ANTHONY AUSTIN, Defendant-Appellant.	UNPUBLISHED December 15, 2005 No. 256612 Wayne Circuit Court LC No. 04-000765-01

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

A jury convicted defendant of first-degree murder, MCL 750.316, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to life imprisonment for the first-degree murder conviction and two years' imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant first argues that the trial court erred by recognizing a Fifth Amendment privilege against self-incrimination for a defense witness. A trial court's determination that a witness's testimony may be self-incriminating is reviewed for an abuse of discretion. *People v Honeyman*, 215 Mich App 687, 696; 546 NW2d 719 (1996).

Under the Fifth Amendment, an individual may decline to testify at any criminal proceeding where the

answers may incriminate him in a future criminal proceeding. *People v Wyngaard*, 462 Mich 659, 671-672; 614 NW2d 143 (2000). If a potential defense witness has a Fifth Amendment privilege against incriminating himself, that privilege overrides a defendant's right to compel testimony. However, this privilege against self-incrimination may only be asserted where the trial court determines that there is a reasonable basis for a witness to fear incrimination. *People v Dyer*, 425 Mich 572, 578; 390 NW2d 645 (1986). "[A] trial court may compel a witness to answer a question only where the court can foresee, as a matter of law, that such testimony could not incriminate the witness." *Id.* at 579. Thus, the trial court decides whether a witness' silence is justified based on the facts in evidence. See *People v Joseph*, 384 Mich 24, 29-30; 179 NW2d 383 (1970).

In this case, the witness, "DeShazo," was an inmate facing trial on a homicide charge. One of DeShazo's codefendants had already been convicted, largely through the testimony of a jailhouse witness. DeShazo was expected to testify that he saw inmate Derrick Green, a prosecution witness, in defendant's cell going through defendant's discovery materials while defendant was not present. The prosecutor indicated that if this testimony were brought up, he would question DeShazo about how jailhouse witnesses would be called in his trial and had been called in his codefendant's trial because the questioning would be relevant to defendant's motive to lie. The prosecutor indicated that he intended to ask DeShazo about how his codefendant presented witnesses at his trial to show that the jailhouse witness stole discovery materials to fabricate his testimony and to show that defendant wished to use a similar tactic to discredit Green's testimony. Defense

counsel stated that if the prosecutor asked any questions about DeShazo's pending trial, he would advise DeShazo to invoke his Fifth Amendment right against self-incrimination. The trial court conducted the proper inquiry and determined that testimony about the case pending against him would be potentially incriminating to DeShazo and that DeShazo would invoke his constitutional privilege. The trial court did not abuse its discretion by refusing to allow defendant to call DeShazo to the stand. *Dyer*, *supra* at 578.

Further, the trial court did not have to allow defense counsel to call DeShazo and have DeShazo invoke his Fifth Amendment privilege on a question-by-question basis. A lawyer may not knowingly call a witness when he is aware that the witness will claim a valid privilege not to testify. *Dyer*, *supra* at 576. Because DeShazo would have a valid right to invoke his Fifth Amendment privilege on relevant questions that the prosecutor would ask, the trial court did not abuse its discretion by refusing to allow DeShazo to testify.

Defendant next argues that the trial court erred by improperly admitting the victim's dying declarations because defendant did not have the right to confront the witness. The dying declarations at issue involve the victim's statement given at the hospital and the audiotape of the victim's 911 call. Defendant must preserve the issue of the admission of evidence with a timely objection. MRE 103(a)(1); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). The party opposing the admission of evidence must object at trial on the same ground that the party asserts on appeal. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Defense counsel failed to object

to the introduction of the victim's statement given at the hospital. Because defendant failed to object to the admission of the victim's statement at the hospital, we review this unpreserved constitutional claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Defense counsel stated that he had no objections to the playing of the 911 tape. This action by defense counsel resulted in a waiver, rather than forfeiture, and thus, the waiver extinguished any error. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000).

Defendant does not dispute that the statements are dying declarations[1] but, rather, contends that the dying declarations are inadmissible under *Crawford v Washington*, 541 US 36, 53; 124 S Ct 1354; 158 L Ed 2d 777 (2004). In *Crawford*, the Court found that testimonial statements of a witness who does not appear at trial are barred unless the witness is unavailable to testify and defendant had a prior opportunity for cross-examination. *Crawford*, *supra*

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[1] Our dissenting colleague would conclude that the statements were not dying declarations, even though defendant does not dispute that the statements were dying declarations. She concludes that there is no evidence that Bowen was aware he was dying when he made the statements, primarily because "he requested something to eat while waiting for the ambulance to arrive." However, the record reveals that immediately after Bowen was shot he called his cousin's name and told her that he could not talk and that his leg was going numb. Bowen had two quarter size holes in his upper left chest area and was bleeding from the mouth. He could not respond at first to questions asked of him due to blood in the throat. Bowen did, in fact, die upon his arrival at the hospital. These facts are sufficient to support a finding that defendant was conscious of his impending death and, presumably, this is the reason that trial defense counsel did not object to the admission of the statements and the reason that appellate defense counsel does not dispute that the statements were dying declarations.

at 53. The Supreme Court held off on a definitive ruling on dying declarations, but indicated that a strong historical basis exists for including dying declarations as an anomaly:

> The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. See, e.g., *Mattox v United States*, 156 U.S. 237, 243-244; 39 L Ed 409; 15 S Ct 337 (1895); *King v Reason*, 16 How St Tr 1, 24-38 (K B 1722); 1 D. Jardine, Criminal Trials 435 (1832); Cooley, Constitutional Limitations, at 318; 1 G. Gilbert, Evidence 211 (C. Lofft ed. 1791); see also F. Heller, The Sixth Amendment 105 (1951) (asserting that this was the only recognized criminal hearsay exception at common law). Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are. See *Woodcock*, *supra*, at 501-504, 168 Eng. Rep., at 353-354; *Reason*, *supra*, at 24-38; Peake, Evidence, at 64; cf. *Radbourne*, *supra*, at 460-462, 168 Eng. Rep., at 332-333. We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is *sui generis*. [*Crawford*, *supra* at 56, n 6.]

Because the rules of evidence allow the admission of dying declarations, see MRE 804(b)(2), and because the United States Supreme Court has not ruled on the issue and has indicated that there are historical reasons for making an exception to the rule in *Crawford* for dying declarations, we conclude that the trial court did not abuse its discretion by admitting the victim's dying declarations.

Defendant next argues that he was denied his right to a fair trial by prosecutorial misconduct. To preserve the issue for appellate review, defendant must timely and specifically object to the prosecutor's improper conduct. *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003). Defendant properly preserved some of the issues for appeal by objecting to the prosecutor's remarks during closing argument. Defendant failed to preserve other claims for review on appeal because he failed to object to the prosecutor's statements in the trial court.

Issues of prosecutorial misconduct are reviewed de novo. To determine if prosecutorial misconduct occurred, the test is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The Court must examine the pertinent portion of the lower court record and evaluate the prosecutor's comments in context to determine whether it was more probable than not that a miscarriage of justice occurred. *Carines, supra* at 774.

Appellate review of unpreserved claims of prosecutorial misconduct is for plain error affecting substantial rights. Reversal is only warranted when a plain error resulted in the conviction of a truly innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceeding independent of the defendant's innocence. Thus, if a curative instruction could have alleviated any prejudicial effect, the appellate court will not find error requiring reversal. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Defendant argues that the prosecutor improperly asked defendant to comment on whether Agent Yott lied

about a fistfight defendant had with the victim. Defense counsel immediately objected and the trial court sustained the objection. Although a prosecutor may not ask a defendant to comment on the credibility of a prosecution witness' testimony, *Ackerman*, *supra* at 448, defendant was not prejudiced by the prosecutor's comments. The trial court instructed the jury that stricken testimony and excluded evidence were not to be considered in deciding the case. The trial court sustained the objection to the testimony, and the jury is presumed to have followed the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant next argues that the prosecutor improperly argued with defendant and accused him of not having the records to prove what he was saying. Defense counsel objected to the prosecutor's questioning and the trial court sustained the objection and instructed the jury that the burden was not on defendant to prove anything. Because the trial court instructed the jury that defendant did not have to prove anything and that the prosecution had the burden of proof, and the jury is presumed to have followed the trial court's instructions, defendant was not prejudiced by the question. *Graves*, *supra* at 486. Further, although defendant does not have the burden to produce evidence, the prosecutor is allowed to comment on defendant's failure to present evidence corroborating his testimony. *People v Fields*, 450 Mich 94, 115-116; 538 NW2d 356 (1995).

Defendant next argues that the prosecutor improperly questioned him about discovery materials. The prosecutor asked defendant if he had seen all the discovery materials and defendant responded that he had seen everything except what the prosecutor gave to the defense attorney at

the last minute. The prosecutor asked if that discovery consisted of two pages, and defendant indicated that it did not. Defense counsel then stated that it was "more like four hundred pages." The trial court told the jury to disregard the conversation and stated that defense counsel was misleading the jury. After more testimony the prosecutor stated that defendant was misleading the jury regarding the discovery and the trial court told the prosecutor that was an improper argument because there was no issue in the case regarding the scope of discovery. The prosecutor's comments did not prejudice defendant. The comments were intended to question defendant regarding his opportunity to conform his testimony to the testimony of the other witnesses and to the discovery materials. The prosecutor is allowed to cross-examine defendant regarding his opportunity and motive to fabricate his testimony. *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). Further, the trial court again took the proper action to defuse any possible prejudice.

Defendant next argues that the prosecutor improperly asked defendant if he had heard particular testimony by the other witnesses. A prosecutor is allowed to ask a defendant if he disagrees with prior testimony, and thus, there was no prosecutorial misconduct by the prosecutor asking these questions. *Buckley*, *supra* at 17.

Defendant argues that the prosecutor engaged in misconduct when defendant stated that he was trying to help and the prosecutor responded by saying, "I doubt that." The prosecutor's offhand remark, after which he returned promptly to questioning defendant, even if improper did not rise to the level of misconduct that would prejudice defendant and deny him a fair trial. Because defendant failed to object, and because a curative instruction

could have alleviated any prejudicial effect, we do not find reversible error. *Ackerman*, *supra* at 448-449.

Defendant argues that during closing argument the prosecutor called defendant a liar and stated that defense counsel was cowardly. The prosecutor stated that defendant's testimony showed that he was a liar. The prosecutor also stated that there was no credible evidence to support defense counsel's argument that Officer Khary Mason was lying and that defense counsel making such an argument was cowardly. A prosecutor has "great latitude" in making his arguments and statements at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor may draw inferences from the evidence, but may not argue facts not in evidence or mischaracterize the evidence. *Id.; People v Goodin*, 257 Mich App 425, 432-433; 668 NW2d 392 (2003); *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Although the prosecutor has a duty to ensure that the defendant receives a fair trial, he also has a duty to advocate the conviction of the guilty. "Prosecutors may use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). A prosecutor's remarks must be read in context. *Bahoda*, *supra* at 267. In this case, the statement regarding defendant and defense counsel referenced the evidence and drew inferences from the testimony presented. The prosecutor specifically mentioned the evidence that led him to draw such conclusions, and thus made proper arguments.

Defendant next argues that he received ineffective assistance of counsel because counsel failed to object to the admission of the dying declarations under *Crawford*, *supra*, and failed to object to the prosecutor's comments

during cross-examination and during closing argument. Defendant has not preserved the issue of effective assistance of counsel for review. Defendant did not move for a new trial and his motion to remand for an evidentiary hearing was denied by this Court, and therefore, this Court's review is limited to the mistakes apparent on the record. *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

A trial court's findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish an ineffective assistance of counsel claim, a defendant must show that counsel's performance failed to meet an objective standard of reasonableness and that the deficient performance so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant assumes a heavy burden of proving otherwise. *LeBlanc*, *supra* at 578.

Defendant claims that counsel was ineffective for not objecting to the admission of the 911 tape and the victim's statement to police because the statements were inadmissible under *Crawford*, *supra*, 541 U.S. 53. But we have already concluded that the statements were properly admitted and, therefore, this argument is without merit.

Defendant also claims that counsel was ineffective for not objecting to the prosecutor's comments during cross-examination and closing argument. The unobjected to incidents include questions concerning whether defendant heard and agreed with prior testimony and the prosecutor's augments [sic] that defendant was a liar. As indicated,

supra, these questions were not improper and, therefore, an objection to the questions would have been futile. Additionally, defense counsel did not object to the prosecutor's comment that he doubted that defendant was trying to help. As indicated *supra*, this comment was not so prejudicial that it affected the outcome of the trial and, therefore, defendant was not denied the effective assistance of counsel by defense counsel's failure to object. *Pickens*, *supra* at 302-303.

Affirmed.

/s/ Alton T. Davis
/s/ E. Thomas Fitzgerald

COOPER, J. (dissenting).

I must respectfully dissent from the majority opinion of my colleagues. Defense counsel should have challenged the admission of Earl Bowen's testimonial statements identifying defendant as the shooter. The only other evidence connecting defendant to this shooting was the testimony of a fellow inmate regarding confessions defendant allegedly made while awaiting trial. It is questionable that the jury would have found defendant guilty beyond a reasonable doubt, absent Mr. Bowen's identification. Accordingly, I would vacate defendant's convictions and remand for a new trial.[1]

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[1] I agree with the majority, however, that the trial court properly excluded the testimony of Mr. DeShazo and that defendant is not entitled to a new trial on the basis of prosecutorial misconduct.

Although a dying declaration identifying one's killer is testimonial in nature,[2] courts have historically admitted such statements as an exception to the hearsay rule.[3] In a criminal trial for homicide, a victim's statements made "while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death" are admissible to prove the truth of the matter asserted under the Michigan Rules of Evidence.[4] It is well established, however, that the victim *must* be conscious of his impending death when the statement is made in order to be characterized as a dying declaration.[5]

There is no evidence that Mr. Bowen was aware that he was dying when his cousin called 911. In fact, he requested something to eat while waiting for the ambulance to arrive. Yet defense counsel expressly waived any objection to the admission of the 911 audiotape. As Mr.

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[2] See Friedman, *Adjusting to Crawford: High court decision restores confrontation clause protection*, 19 Crim Just 4, 9 (2004):

> [A] declaration by a dying person identifying his or her killer should be considered testimonial even though the only person who hears it is a private individual; the purpose of the communication is presumably not merely to edify the listener, but rather to pass on to the authorities the victim's identification of the killer, and the understanding of both parties to the communication is that the listener will play his or her role.

[3] *Crawford v Washington*, 541 U.S. 36, 56 n 6; 124 S Ct 1354; 158 L Ed 2d 177 (2004) ("Although many dying declarations may not be testimonial in nature there is authority for admitting even those that clearly are.").

[4] MRE 804(b)(2).

[5] See *People v Johnson*, 334 Mich 169, 173; 54 NW2d 206 (1952); *People v Parney*, 98 Mich App 571, 583; 296 NW2d 568 (1979).

Bowen's statement would not be admissible under any other exception to the hearsay rule, defendant was clearly prejudiced by counsel's error.[6]

Mr. Bowen's statement at the hospital implicating defendant was made at the instigation of law enforcement and was clearly testimonial in nature.[7] It is not clear from the record, however, that Mr. Bowen was aware that he was dying while he was being treated in the hospital. Detroit police officer Khary Mason testified that *he* believed that Mr. Bowen's injuries were fatal. He testified that he told Mr. Bowen that "he looked pretty bad." However, Mr. Bowen was able to answer Officer Mason's questions and nothing in the record suggests that he was informed of the actual extent of his injuries. Had defense counsel objected to the admission of this statement, the

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[6] I would specifically note that Mr. Bowen's statement could not be characterized as an excited utterance under to MRE 803(2). Mr. Bowen only identified his shooter upon the encouragement of the 911 operator, not upon a spontaneous impulse while under the stress of his recent shooting. See *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19 (a person "still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy' "). Furthermore, the continued admissibility of testimonial statements otherwise falling into the hearsay exception for excited utterances is not clear under Michigan or federal law in light of the United States Supreme Court's recent grant of certiorari to consider this issue. *Davis v Washington*, ___ U.S. ___; 126 S Ct 547; ___ L Ed 2d ___ (2005) (specifically addressing whether statements to a 911 operator are testimonial in nature); *Hammon v Indiana*, ___ U.S. ___; 126 S Ct 552; ___ L Ed 2d ___ (2005). See also *People v Walker*, ___ Mich ___; ___ NW2d ___ (2005) (leave to appeal held in abeyance pending the United States Supreme Court's resolution of these appeals).

[7] *Crawford*, *supra* at 52-53.

prosecution would have been required to support the admission of the proffered testimony.

Mr. Bowen's statements were testimonial in nature and were not clearly admissible under any hearsay exception. Mr. Bowen was obviously unavailable for trial and defendant had no prior opportunity for cross-examination.[8] Therefore, defense counsel could have established that the admission of these statements violated defendant's Sixth Amendment right to confront the witnesses against him. As the remaining evidence against defendant is extremely weak, this error was not harmless.[9] Accordingly, I would find that defendant's convictions must be vacated.

/s/ Jessica R. Cooper

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[8] *Id.* at 55-56.

[9] See *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 528 (1994).

Order

Michigan Supreme Court
Lansing, Michigan

September 27, 2006

Clifford W. Taylor,
Chief Justice

130489

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE
STATE OF MICHIGAN,
Plaintiff-Appellee,

SC: 130489
COA: 256612
Wayne CC: 04-000765-01

v

SHERMAN ANTHONY AUSTIN,
Defendant-Appellant.
_____/

On order of the Court, the application for leave to appeal the December 15, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

KELLY, J., would grant leave to appeal.

[SEAL] I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

September 27, 2006 /s/ Corbin R. Davis
Clerk

STATE OF MICHIGAN

THIRD JUDICIAL CIRCUIT COURT –
CRIMINAL DIVISION

THE PEOPLE OF THE
STATE OF MICHIGAN,

vs.

Case No. 04-00765

SHERMAN A. AUSTIN,

Defendant.
_____/

JURY TRIAL

Proceedings had and testimony taken before the HONORABLE PAUL S. TERANES, Circuit Court Judge, Frank Murphy Hall of Justice, Detroit, Michigan, on Monday, June 7, 2004.

APPEARANCES:

PATRICK MUSCAT, Esq.,
Assistant Prosecuting Attorney

Appearing on behalf of the People.

STEVEN C. BULLOCK, Esq.,

Appearing on behalf of Sherman A. Austin.

HELEN ROSS JACKSON, CSR-2326
Official Court Reporter

* * *

[3] Detroit, Michigan

Monday, June 7, 2004

(Outside the presence of the jury)

THE CLERK: File #04-000765 People versus Sherman A. Austin, charged with murder first degree and felony firearm. The matter is here for jury trial.

MR. MUSCAT: Good morning, Your Honor. Patrick Muscat on behalf of the People.

MR. BULLOCK: Good morning, Your Honor. Steven Bullock on behalf of Mr. Austin, who's also present and before you this morning.

THE COURT: The first thing we're going to take up this morning is the issue concerning a witness, Mr. DeShazo, and his ability or lack of ability to raise the Fifth Amendment and Mr. Daly, you're representing Mr. DeShazo; is that correct?

MR. DALY: Yes, Your Honor. For the record Craig Daly on behalf of Mr. DeShazo.

THE COURT: Mr. Bullock, I understand you wish to call Mr. DeShazo during the course of the defendant's case; is that correct?

MR. BULLOCK: Yes, Your Honor. It's our understanding upon the prosecutor's amendment of his witness list, I want to say three weeks ago and I'm [4] sure Mr. Muscat will correct me if that's not accurate, we conducted an investigation of our own. That amended witness list included the addition of an individual by the name of Derrick Green, a convict [sic] murderer out of this particular court. Mr. Muscat proffered that Mr. Green

would testify that Mr. Austin quite frankly confessed to the killing for which he is on trial at the present time. We have some unsigned statements from Mr. Green, I guess indicating what his proposed testimony is going to be.

Our investigation revealed that there were two individuals who observed Mr. Green in Mr. Austin's cell, even to the point of going through some discovery material. Mr. DeShazo being one of them and Marcus Hill being another one. Both of those individuals were writed [sic] out at our request in order to testify should Mr. Green testify for the People.

MR. MUSCAT: I should note that that witness statement is signed and now I'm giving Mr. Bullock a copy of the signed one. It hasn't changed at all, but I'll give him a copy of the signed witness statement.

As I indicated before at sidebar, I'm also prosecuting Mr. DeShazo on June 28th. Mr. DeShazo, Mr. Williams, and a man named Mr. Potter were all charged with a homicide.

[5] Mr. Potter was convicted largely on the part of jailhouse testimony from a witness. People intend on using two jailhouse witnesses against Mr. DeShazo and Mr. Williams. As a result I believe there could be some questioning into the ease that Mr. DeShazo stands trial for because it's relevant towards bias. In other words, I'm going to come and lie about a snitch witness against you, because there's a snitch witness lying against me and snitch witnesses already lied against my buddy Kevin Potter, who's been convicted for the murder.

So, although I don't think that would affect his Fifth Amendment privilege, that's part of the cross-examination I would take against Mr. DeShazo.

THE COURT: All right. Mr. Muscat, you lost me with the snitch witnesses. You want to run that by me again?

MR. MUSCAT: Mr. DeShazo is set for trial June 28th.

THE COURT: I understand that.

MR. MUSCAT: He had two co-defendants, Mr. Potter and Mr. Williams. Mr. Potter was already convicted largely by the testimony of a jailhouse witness. Mr. DeShazo and Mr. Williams have two jailhouse witnesses that will be testifying against [6] them. I intend on inquiring in the cross-examination about the fact that Mr. DeShazo and Mr. Williams have a case against them where snitch witnesses are a major part of the evidence because I believe it's relevant towards bias and a motive for him to lie in another case where another defendant faces the testimony of a snitch witness.

I don't believe those questions would be ones that will cause him to incriminate himself. So I don't think that they are barred by the Fifth Amendment, even if he had a valid privilege.

THE COURT: I think I understand what you're going to be asking him. So your questions are going to be limited to the fact that the case against Mr. DeShazo is based in part on what you call jailhouse witnesses or snitch witnesses against Mr. DeShazo; is that correct?

MR. MUSCAT: Yes, and it was based in part against a charged co-defendant of his, Mr. Potter, who's been convicted. So there is a motive to lie because – and in fact, Your Honor, Mr. Potter ran the same defense. Mr. Potter brought in witnesses in his trial that testified that my jailhouse witness stole discovery. So it's all in my opinion linked together in terms of bias and a potential to lie.

[7] THE COURT: Mr. Daly, as far as Mr. DeShazo's position is concerned?

MR. DALY: Well, judge, I guess it depends in part on your ruling. Mr. DeShazo could testify about anything that he saw and heard in the county jail and he would not be in a position to invoke his Fifth Amendment privilege. However, if you allow Mr. Muscat to start asking him questions about his pending case, then he would invoke the Fifth Amendment.

So how far we go with this depends on your ruling in the first instance. If you allow Mr. Muscat to question Mr. DeShazo about anything involving his case, I can tell you that he will invoke his Fifth Amendment and under those circumstances my understanding is that he cannot be called as a witness at all. So to a large extent it depends on how much latitude, if any, you're going to give Mr. Muscat to cross-examine Mr. DeShazo regarding his own case.

THE COURT: Well, I would agree to what you said about the fact that Mr. DeShazo could testify to what he observed in the Wayne County Jail and that would not be privileged by reason of the Fifth Amendment. Now, as I understand Mr. Muscat's questions are going to go to basically Mr. DeShazo's defense in the case.

[8] MR. MUSCAT: Not necessarily, Your Honor. I don't know Mr. DeShazo's defense, but no I don't intend on asking him questions about his defense. What I intend on asking him is that there are witnesses against him that are alleged jailhouse snitches, two of them. That a co-defendant of his has already been convicted from the use of a jailhouse snitch and I think that's relevant towards bias and motive that would cause him to come in here and lie which I would suggest I think he's about to do if he's testifies.

THE COURT: Well, the questions going to whether or not there are jailhouse witnesses testifying against him, as I see it would not incriminate himself. It would be testifying what case the prosecution has against him. It has nothing to do with his defense – or excuse me, with him admitting anything as to the charges against him. It's just saying who the witnesses are that are going to testify against him.

Now, when I mentioned that some of it gets into his defense, Mr. Muscat, you had something in reference to the fact that Mr. DeShazo is going to say that there was some stealing of the evidence or something. I didn't quite understand that aspect of the testimony.

MR. MUSCAT: It is my impression that [9] Mr. DeShazo is going to testify to one of two things. A, that Mr. Green who is my witness, stole the defendant's discovery or B, that he went through the defendant's discovery while in the jail cell. Those are the same type of allegations that were made against my witness in Mr. DeShazo's co-defendant's case. It's the same type of allegations that I'm assuming that Mr. DeShazo will make at some point in his trial against my witnesses in his case, but I don't intend to

ask him what he's going to do in his trial. All I'm going to bring up is that he's aware of the fact that there are snitch witnesses against him, because one of them testified at the exam, I think, and I filed a witness list, Mr. Daly has a copy, and I'm sure Mr. DeShazo knows the type of witnesses that are testifying against him.

I'll also bring up the fact that his co-defendant Kevin Potter was convicted by, largely by the testimony of a snitch witness and the defendant in that case Kevin Potter called witnesses to suggest that the defendant was lying.

MR. BULLOCK: Your Honor, if I may on behalf of Mr. Austin, we believe that any reference to Mr. Potter's case and or his conviction is so prejudicial that this Court should not allow that into [10] evidence in this case.

THE COURT: That's the problem I have with referring to Mr. Potter's case and that Mr. Potter was convicted for two reasons, one of which is what Mr. Bullock addressed and the other reason being that in a trial of Mr. DeShazo is the fact that a co-defendant was convicted by another jury, could not be brought out, but if you're getting into that in his questioning and having him answer that question, then that could be argued that that can be used against him at a later time that he testified to those facts.

MR. MUSCAT: May be I mis-spoke, Your Honor. I agree I would not ask any witness what the outcome of Mr. Potter's case was. I would only inquire into Mr. DeShazo as if he knew that when Mr. Potter went to trial, that there were snitch witnesses called against him and that other defense witnesses were called to claim that the statements were stolen or discovery was stolen. I don't think it's proper to get into what the verdict in the Kevin Potter case was.

MR. DALY: I think you and I have a difference of professional opinions on what questions Mr. Muscat may ask my client and what may be incriminating because I would advise Mr. DeShazo that if Mr. Muscat asked him any questions whatsoever about [11] his case, whether it's are you aware of or do you know, then he has a right to invoke his Fifth Amendment privilege and it doesn't matter what type of angle Mr. Muscat may have on it, if it's for bias or if it's just general knowledge that my client may or may not have; he could invoke his privilege. I would tell him to do so and I think that the Court would be obligated to – I think you would be bound by that.

THE COURT: Mr. Daly, you're saying by asking him even a question about are you charged with a crime would be violating his right to remain silent in the case against him?

MR. DALY: I think yes. Any question whatsoever about his case, are you charged, do you know what happened in Mr. Potter's case, do you know that in your case somebody was called as a jailhouse snitch, do you know that the defense in Mr. Potter's case, where somebody took his discovery; all of that stuff about what he may or may not know about his own case could be used against him in a subsequent case and he has an absolute unequivocal right to refuse to say anything about his case, including what he's charged with. He has no obligation.

THE COURT: All right. Mr. Muscat, how about getting down to the basic principle. That he has a [12] right to absolute silence, to take the Fifth Amendment. That he doesn't have to testify about anything, not even his knowledge of the charges against him.

MR. MUSCAT: I really have no opinion on that because I don't think – it's not for me to decide what Mr. Bullock – I mean if the Court finds that he has a valid Fifth Amendment privilege, then he can't testify. I think the rule is based on what is likely to cause an incriminating response. I don't think the questions asking him about his knowledge of the evidence against him would invoke that type of response because it can be provided to him through discovery and through the court. He's heard witnesses testify against him. I don't think it would imply that he has personal knowledge of any of those facts simply because he knows of those facts. So I personally don't think it invokes his Fifth Amendment privilege, but I really have no position on that, because I respect Mr. Daly's protecting his client. Mr. Bullock is the proponent of this motion to force Mr. DeShazo to testify. If he's allowed, I just want to know the perimeters of what I can do.

THE COURT: That's one of the things I'm looking into, is what's going to happen during the cross-examination. That may be is even more important [13] than Mr. Bullock calling him as a factual witness.

As far as the right to remain silent, the defendant has an absolute right to remain silent. He doesn't have to say anything about his case and I think when we're getting into, the cross-examination, that's the first thing that concerns me. When you get into the cross-examination, then you get into questions pertaining to charges against him and whether or not some of those charges against him are based on jailhouse snitches testifying against him.

I would agree with Mr. Daly that the defendant has the absolute right to remain silent concerning the case

pending against him. Even to acknowledge under oath that there is a case pending against him might be able to be used against him at a later time.

So as far as questions concerning the case pending against him, I agree with Mr. Daly that Mr. DeShazo has an absolute right to remain silent and therefore can raise the Fifth Amendment concerning any questions about the case pending against him. As far as being a factual witness he would be – there would not be any Fifth Amendment Right saying that he was in the jail and saw Mr. Austin in Mr. Green's cell or vice versa and that's basically as far as it would go. You [14] know the fact that he's in the county jail and what he saw is just a factual basis, it does not deal with the case that he has. So with that then, if we get into cross-examination, then he would have the right to raise the Fifth Amendment.

MR. BULLOCK: If I may interject, Your Honor. On behalf of Mr. Austin, I would suggest to the Court that any cross-examination regarding Mr. DeShazo's case is irrelevant and immaterial. It's not germane to the issue of whether or not this jury is going to believe Mr. DeShazo or not as to what he saw regarding Mr. Austin's case.

I would suggest to the court that you can't bring up extraneous matters as Mr. Muscat has indicated he can do simply to – simply in an effort to discredit the witness.

MR. MUSCAT: I'll propose a stipulation that if Mr. Bullock takes that line of thinking and agrees not to cross-examine my witness with any of the facts of his case, then I won't cross-examine any of Mr. Bullock's witnesses about the facts of their murder cases.

MR. BULLOCK: Well, obviously I'm not going to agree to that.

MR. MUSCAT; Well, then it's obviously [15] relevant. Then my point is made, it's obviously relevant.

MR. BULLOCK: No. The credibility of a witness is the ultimate issue of fact for the jury to decide. We would suggest to the Court that the issues Mr. Muscat wishes to bring up in front of the jury are not relevant to the issues of credibility and as to those issues, the Court should not allow them to be asked of Mr. DeShazo.

THE COURT: Well, they go to motive for his testimony. They can be implied to go to the motive for Mr. DeShazo's testimony in that a co-defendant was convicted on similar testimony and similar testimony against him and therefore he wants to preclude that type of testimony to be used against anyone else. That could be, you know, a motive in the case and then we're getting into motive and credibility. So I can see there would be relevance to that line of questioning. So if there is relevance in that line of questioning and Mr. Muscat has a right not to pursue that line of questioning – let me rephrase that. Mr. DeShazo has a right not to allow Mr. Muscat to pursue that line of questioning and raise the Fifth Amendment. Then that would put Mr. Muscat in a position where he couldn't show motive or attack the credibility of the witness.

[16] So I guess with that then, having had a right to raise the Fifth Amendment, then Mr. Muscat couldn't go into a line of questioning which would deal with the witness's credibility or motive and would be precluded from totally developing the attitude, motive, and intent of the witness in testifying.

Now, I take it we don't have this problem with Mr. Hill; is that correct?

MR. BULLOCK: I need to talk to Mr. Hill. I mean he is not pending charges. He has been actually sentenced on a conviction. So I believe Mr. Hill is at least in the building, if not in the back locked up.

THE COURT: But as far as Mr. DeShazo is concerned, I find that he does have a Fifth Amendment Right and that the questions that Mr. Muscat would be asking him would be relevant and therefore to preclude Mr. Muscat from going into those questions would mean that you can't force the witness to take the Fifth Amendment and therefore the witness does not have to testify. You're requesting that the witness not testify, Mr. Daly; is that correct?

MR. DALY: My understanding unfortunately for Mr. Austin is that knowing that Mr. DeShazo will take the Fifth, Mr. Austin is precluded from calling him to the witness stand.

[17] THE COURT: So under all the circumstances, I would find that Mr. DeShazo does have the right to take the Fifth Amendment and therefore could not be called by Mr. Austin to take the witness stand.

MR. BULLOCK: And that protection, Your Honor, again on behalf of Mr. Austin only last [sic] while these charges are pending against Mr. DeShazo. So at the conclusion of Mr. DeShazo's trial, regardless of the outcome, he would no longer have the protection of the Fifth Amendment; is that my understanding?

THE COURT: If there's a finding, you know, jeopardy would lie. First, if he's found not guilty jeopardy

lies and if he's found guilty, then there would not be a Fifth Amendment – the only Fifth Amendment that might lie is if you almost have to wait until the appeal is done because if he's found guilty there could be a reversal, a new trial and again you would still have that fight for the Fifth Amendment because of a new trial. So you could not be using it at a later time. That's one of the problems if there's an appeal.

MR. DALY: Judge, may I be excused?

THE COURT: Yes. I think we have nothing further as to the issue concerning Mr. DeShazo. Is that correct?

[18] MR. BULLOCK: I believe so. In other words, you're correct.

THE COURT: So any problem with excusing Mr. Daly?

MR. BULLOCK: Not on behalf of Mr. Austin.

THE COURT: Thank you, Mr. Daly.

MR. DALY: Thank you, judge.

MR. BULLOCK: I guess at this point and time I'm going to be compelled to ask now for a recess of this trial. In so much as Mr. DeShazo is an essential witness on behalf of Mr. Austin, as a result of the late endorsement of Mr. Green as a prosecution witness, I don't think I have an alternative but to protect Mr. Austin's rights, as well as to protect the record and ask for an adjournment.

MR. MUSCAT: Your Honor, I should note for the record and the date of the endorsement of Derrick Green will speak for itself before Judge O'Hair, I believe it

would have been three to four weeks ago from the trial date, just within the 30 days that's usually required by notice. We had a motion on this subject matter. Judge O'Hair granted my motion to amend the witness list. Opportunities for adjournments could have been taken at that point. A witness statement was provided of Mr. Green's testimony at that point.

[19] Shortly after that, I don't know when, but very shortly after that I received a witness list of the name Marcus Hill and Donald DeShazo on it. So, again there were multiple opportunities to seek an adjournment in this case. You have to know there's a possibility of this occurring with one of your witnesses when it's clearly reflected that one of the witnesses has a pending murder trial. I don't see how you can now in mid trial ask for an adjournment and I ask the Court to deny that motion.

MR. BULLOCK: Your Honor, if I can respond since it is my motion. This goes along with the fact that the People waited three years to bring these charges against Mr. Austin. I mean it just inures to their benefit and also once again shows prejudice to Mr. Austin that they waited 36 months to do this. Obviously, Mr. Muscat is and always has been in a superior position and the government in a superior position when they wait, when there's no new information between those three years and the day of the shooting. The Court heard the tape. That's the evidence against Mr. Austin. Nothing has changed since then. So, frankly, we would again renew our motion to dismiss, but also use that as justification on the motion for a recess of this case pending a resolution [20] of Mr. DeShazo's case.

THE COURT: Well, as far as, you know, the last comment of Mr. Bullock is concerned, we've already ruled on that. As far as a recess is concerned, we had this discussion prior to beginning the case and whether or not there was even the issue of asking for an adjournment on the day of trial. I was not in position to grant the adjournment. I did talk to Judge Sullivan, the Presiding Judge of the Criminal Division, concerning an adjournment under these facts to wait for the trial on Mr. DeShazo and Judge Sullivan indicated that under the circumstances he would not grant the adjournment, that we would go ahead with the trial as set. That any request for an adjournment should have been brought up at an earlier date rather than at the time of trial. So, I'm going to deny the request to, I guess recess the case until after the case against Mr. DeShazo.

MR. BULLOCK: Just so we have a clear record in case someone at some point reviews this record, I was not informed until the Friday before the start of trial that there was an issue on behalf of Mr. DeShazo by Mr. Daly and that was quite frankly the Friday before the Memorial Day weekend. So there was no time to advise the Court, but I think we made the [21] situation – the Court immediately aware as soon as we were able to.

The other issue is to protect the record, do we now proceed to Judge Sullivan's courtroom to ask for a recess/adjournment or is this a sufficient enough ruling so that we've protected our appellate right?

THE COURT: Well, I guess the question is under the court rules it's Judge Sullivan –

MR. BULLOCK: (Interposing) Who's the ultimate arbitrator?

MR. MUSCAT: Not on a trial in progress.

THE COURT: What you're asking for is a recess, Mr. Bullock; is that correct?

MR. BULLOCK: Yes, because we've already started the trial.

THE COURT: I think that once we started the trial, it's the trial judge who would have the ultimate say as to whether or not there should be a recess and I think the record is clear enough that I'm denying the request for a recess.

MR. BULLOCK: I'll rely on that.

THE COURT: And I think the record is clear on that. I'm denying your request for a recess.

MR. BULLOCK: Very well. Now, I'm wondering if I could have five minutes to talk to Mr. Hill, who [22] is in the back to see if we have a problem with Mr. Hill as a witness.

THE COURT: All right. You may talk to Mr. Hill.

MR. BULLOCK: Thank you, Your Honor.

THE COURT: We'll take a short recess at this time.

(Whereupon a recess was taken)

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OPPOSITION BRIEF

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(2)

FILED
MAR 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-886

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2006

SHERMAN AUSTIN,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

The Supreme Court recognized in *Crawford v. Washington* that the Sixth Amendment right of confrontation is not violated by the admission of evidence falling into one of the common law "exceptions established at the time of the founding." The dying declaration exception to hearsay allowing testimonial statements against an accused in a criminal trial was firmly rooted in the common law prior to the ratification of the Sixth Amendment. Are dying declarations, even those testimonial in nature, admissible as exceptions to the Confrontation Clause of the Sixth Amendment?

II.

A defendant's Sixth Amendment right to produce witnesses on his behalf is not limitless and may bow to accommodate other legitimate purposes. To prevent any adverse inferences against the defendant, to protect the constitutional rights of the witness, and to preserve a party's right to meaningful cross examination, Michigan precedent prevents parties from calling a witness to testify if that witness will assert a valid Fifth Amendment privilege on the stand. Does the Sixth Amendment prevent the State from enforcing its evidentiary rule?

III.

Prosecutorial misconduct will not necessitate the reversal of a conviction unless the prosecutor's actions and comments denied the defendant a fair and impartial trial. Here, most of the prosecutor's alleged misconduct was quickly met by a defense objection and an instruction for the jury to disregard the prosecutor's comments. Was any misconduct by the prosecution mitigated to preserve a fair and impartial trial for petitioner?

IV.

Trial counsel is ineffective, violating his client's Sixth Amendment right to counsel, only if his performance was so deficient that it deprived the defendant of a fair and reliable trial. Here, trial counsel failed to make meritless objections to the admission of evidence and to harmless comments by the prosecutor. Did trial counsel's failure to make these frivolous objections deny petitioner a fair and reliable trial?

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2006

SHERMAN AUSTIN,
Petitioner,

VS.

THE PEOPLE OF THE STATE OF MICHIGAN
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MICHIGAN

NOW COMES the State of Michigan, by **KYM L. WORTHY**, *Prosecuting Attorney for the County of Wayne*, and **TIMOTHY A. BAUGHMAN**, *Chief of Research, Training, and Appeals*, and **JON P. WOJTALA**, *Assistant Prosecuting Attorney* and respond to Petitioner's request that a Writ of Certiorari issue to review the judgment of the Michigan Supreme Court, entered in this cause on September 27, 2006.

OPINIONS BELOW

The order of the Michigan Supreme Court denying leave to appeal is reported at 477 Mich. 872, 721 N.W.2d 582 (2006). The opinion of the Michigan Court of Appeals is unreported, and is attached to Petitioner's brief as an appendix.

STATEMENT OF JURISDICTION

The Michigan Supreme Court issued its order on September 27, 2006. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, . . . to be confronted with the witnesses against him; to have

> compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At approximately 5:40 a.m. on April 20, 2001, the victim, Earl Bowen, walked from his home to his car parked at 13313 Maiden in Detroit. When he reached the car, petitioner, Sherman Austin, approached him. Petitioner is the father of the victim's former girlfriend, Shatoya Austin. Petitioner pointed a gun at the victim and shot the victim five times. (6/7, 141)[1] Monica Bowen, the victim's cousin, heard the gunshots and called 911. While on the phone with 911, Bowen asked the victim if he saw who shot him. The victim told Bowen that "Toya's daddy" shot him. (6/3, 90) The police and EMS soon arrived at the scene and the police attempted to ask the victim who shot him. The victim's throat was filled with blood and he was no longer able to speak. An ambulance took the victim to the hospital and emergency procedures were performed. These procedures cleared the victim's throat allowing him to tell the police that petitioner shot him. The victim soon died.

Despite the victim's declarations that petitioner was the shooter, charges against petitioner were not issued until years later. After petitioner was arrested for the murder, he admitted to another prisoner, Derrick Green, that he committed the murder. (6/7, 79)

On June 2, 2004, a jury trial commenced in the Third Circuit Court for Wayne County, Michigan, the Honorable Paul S. Teranes presiding. The criminal information charged petitioner with one count of First Degree Premeditated Murder, MCL 750.316, and one count of Felony Firearm, MCL 750.227b. On June 9, 2004, after 3 hours of deliberations, the jury found petitioner guilty as charged. On June 24, 2004, Judge Harvey Tennen sentenced petitioner to the mandatory term of life imprisonment without the possibility of parole for the murder conviction. This term would be served consecutive to the mandatory term of 2 years imprisonment for the firearm charge.

Petitioner appealed his conviction as of right to the

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[1]References to the trial record will be cited by the date of the hearing followed by the page number.

Michigan Court of Appeals. Petitioner claimed that the trial court reversibly erred in allowing a witness to assert his Fifth Amendment right against self-incrimination and excluding the witness from testifying at trial. Petitioner also claimed that the trial court's admission of the victim's dying declarations violated his rights under the Confrontation Clause. Petitioner next claimed that the prosecutor's misconduct during cross examination and final arguments denied him a fair trial. Petitioner finally claimed that his trial counsel's performance denied him a fair trial.

On December 15, 2005, the Michigan Court of Appeals, by a 2 to 1 vote, affirmed petitioner's conviction. The majority found that the trial court correctly determined that the defense witness had a valid Fifth Amendment privilege and it was not an abuse of discretion to refuse to allow the witness to testify and assert his privilege before the jury. The majority further found that petitioner waived any challenge to the admission of the 911 recording when he consented to its admission. The admission of the victim's statement to the police identifying petitioner as the shooter was not plain error because the Michigan Rules of Evidence allowed its admission and the United States Supreme Court has not ruled that dying declarations violate the Confrontation Clause. The majority then found that neither the alleged misconduct by the prosecutor nor the alleged ineffectiveness of defense counsel denied petitioner of a fair trial.

The dissenting judge found no grounds to reverse from the exclusion of the witness from testifying or from the alleged prosecutorial misconduct. However, the judge found that it was ineffective assistance of defense counsel not to challenge the victim's statements. The judge believed that the 911 recording did not constitute a dying declaration and the statement to the police officer was a testimonial statement that violated petitioner's right to confrontation.

Petitioner applied to the Michigan Supreme Court for leave to appeal the Court of Appeals decision. Petitioner raised all the issues previously presented in the lower

appellate court. On September 27, 2006, the Michigan Supreme Court denied leave to appeal.

Petitioner now moves the United States Supreme Court to issue a writ of certiorari to the Michigan Supreme Court.

REASONS FOR DENYING THE WRIT

I.

The Supreme Court recognized in *Crawford v. Washington* that the Sixth Amendment right of confrontation is not violated by the admission of evidence falling into one of the common law "exceptions established at the time of the founding." The dying declaration exception to hearsay allowing testimonial statements against an accused in a criminal trial was firmly rooted in the common law prior to the ratification of the Sixth Amendment. Are dying declarations, even those testimonial in nature, admissible as exceptions to the Confrontation Clause of the Sixth Amendment?

Petitioner's challenge to the admission of the deceased victim's statements is not properly preserved for this Court's review. Petitioner waived any issue with the admission of the 911 recording by expressly agreeing to its introduction. Petitioner's agreement bars any review by the Court.[2] Petitioner also failed to object to the admission of the victim's statement to the police at the hospital. The absence of an objection forfeits any error.[3] Any review that this Court may grant to Petitioner's claim is limited solely to the victim's statement to the police and only to determine if plain error resulted from the statement's admission.

Petitioner has also forfeited his confrontation claims by killing the witness that would have testified against him.

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[2] *United States v. Olano*, 507 US 725, 733, 113 S Ct 1770, 123 L Ed 2d 508 (1993)

[3] *Olano*, supra.

This Court has accepted the rule of "forfeiture by wrongdoing."[4] "[I]f a witness is absent by [the accused's] wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away."[5] Petitioner's act of killing the victim, which prevented the victim from appearing and testifying, forfeited any assertion he can make that his constitutional rights have been violated.

Petitioner claims that his rights under the Confrontation Clause were violated when the trial court admitted into evidence two statements made by the victim identifying petitioner as the murderer. The prosecution played a recording of a 911 call on which the victim can be heard identifying petitioner as the person who shot him. (6/3, 90) The call was made moments after the shooting. Following the 911 call, emergency personnel arrived at the scene and took the victim to the hospital. At the hospital, emergency medical procedures were administered to the victim. During this time, P.O. Khary Mason asked the victim to identify the shooter. The victim again identified petitioner as the shooter. (6/7, 58)

The trial court's decision to allow Mason's testimony cannot be plain error because no error exists. Petitioner's claim of error relies exclusively on the premise that this Court's opinion in *Crawford v. Washington* bars Mason's testimony about what the victim told him because the victim is unavailable and the defense had no opportunity to cross examine him. However, *Crawford* has no application to this case. The touchstone of *Crawford* is the existence of "testimonial" hearsay. *Crawford* failed to precisely define what constitutes testimonial hearsay beyond the Court's pronouncements that "ex parte testimony at a preliminary

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[4] *Crawford v. Washington*, 541 US 36, 62, 124 S Ct 1354, 158 L Ed 2d 177 (2004).

[5] *Reynolds v. United States*, 98 US 145, 158, 25 L Ed 244 (1879).

hearing" and statements "taken by police officers in the course of interrogations" are indisputably testimonial and the Court's concluding summary that those "modern practices with closest kinship to the abuses at which the Confrontation Clause was directed," "the civil-law mode of criminal procedure," were also deemed testimonial.[6] In *Davis v. Washington*[7], the Court further defined the differences between "testimonial" and nontestimonial" hearsay:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[8]

Although the victim made his statement to a police officer, it was in a non-interrogative setting. The victim was in the hospital receiving treatment for his injuries and was in

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[6]*Crawford v. Washington*, supra at 68.

[7]*Davis v. Washington*, __ US __, 126 S Ct 2266, 165 L Ed 2d 224 (2006).

[8]*Davis*, supra at 2273-2274.

the last waning moments of his life. The victim was not a suspect in his own shooting nor was he in police custody. Mason did not employ the type of structured questioning that is a mark of "police interrogation" as contemplated by *Crawford*. The victim's dying declaration to Mason during the last moments of his life was not a testimonial statement. The Court in *Crawford* expressly held that its opinion applied only to testimonial hearsay while leaving its opinion in *Ohio v. Roberts*[9] intact regarding whether non-testimonial hearsay violates the Confrontation Clause. The victim's statement to Mason is admissible under the *Roberts* standard: the admission of statements as substantive evidence does not violate the Confrontation Clause if the prosecution can establish that the declarant was unavailable as a witness and that the statement bore adequate indicia of reliability, or if the statements fell within a firmly rooted hearsay exception. [10] There is no dispute that the deceased victim was unavailable at trial. Petitioner also does not dispute that the victim's statement to Mason was a dying declaration. Michigan Rule of Evidence 804(b)(2) allows dying declarations to be admitted into evidence as a hearsay exception. *Roberts* itself identified dying declarations as falling within a firmly rooted hearsay exception.[11] The trial court did not error when it followed existing Michigan law and, under *Roberts*, the statement did not violate the Confrontation Clause.

Even if the victim's statement could be considered testimonial, its admission was not plain error. At the time of trial and today, it is not "clear and obvious" that a testimonial dying declaration is barred by the Confrontation Clause. This

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[9]*Ohio v. Roberts*, 448 US 56, 100 S Ct 2531, 65 L Ed 2d 597 (1980).

[10]*Roberts*, at 66.

[11]*Roberts*, supra at 66 n 8; *Pointer v. Texas*, 380 U.S. 400, 407, 85 S. Ct. 1065, 1069, 13 L.Ed.2d 923 (1965).

Court declined to make this holding in *Crawford*. As such, no United States Supreme Court, Michigan Supreme Court, or Michigan Court of Appeals decision barred the trial court from admitting the evidence. Rather, an abundance of precedent, following *Roberts*, ruled that dying declarations are admissible and not contrary to the Confrontation Clause.

This Court's language regarding the interaction of dying declarations and the Confrontation Clause further defeats any claim that the trial court committed a plain error. In *Crawford*, Justice Scalia recognized dying declarations as a possible exception to the rule. "Although many dying declarations may not be testimonial, there is authority for admitting even those that clearly are."[12] The authority Justice Scalia refers to recognizes that the dying declaration exception to hearsay was firmly rooted in the common law prior to the ratification of the Fifth Amendment.

> The common law allowed "the declaration of the deceased, after the mortal blow, as to the fact itself, and the party by whom it was committed," provided that "the deceased at the time of making such declarations was conscious of his danger." To exclude such evidence as violative of the right to confrontation "would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that

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[12] *Crawford*, at 56 n. 6 (citations omitted).

> sense of justice and regard for individual security and public safety which its exclusion in some cases would inevitably set at naught. But dying declarations, made under certain circumstances, were admissible at common law, and that common law was not repudiated by our constitution in the clause referred to, but adopted and cherished."[13]

In *Mattox v. United States,*[14] the Court recognized a dying declaration as an example of hearsay evidence that was admissible despite being contrary to the literal meaning of the Confrontation Clause. *Mattox* indicated that many provisions of the Bill of Rights were subject to exceptions recognized long before the adoption of the Constitution and that "such exceptions were obviously intended to be respected."[15] "[F]rom time immemorial [dying declarations] have been treated as competent evidence and no one would have the hardihood at this day to question their admissibility. They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules,

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[13] *People v. Monterroso*, 101 P3d 956, 971 (Cal. 2004), quoting *King v. Reason* (K.B. 1722) 16 How. St. Tr. 1, 24-25 and *State v. Houser*, 26 Mo. 431, 438 (1858).

[14] *Mattox v. United States*, 156 US 237, 243, 15 S Ct 337, 39 L Ed 409 (1895).

[15] *Id.*

simply from the necessities of the case, and to prevent any manifest failure of justice."[16]

If the Confrontation Clause "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding,"[17] then testimonial dying declarations must be recognized as an exception to the Confrontation Clause and the rule in *Crawford*. The trial court did not commit plain error by admitting the victim's dying declaration into evidence.

Even if the trial court erred in allowing the victim's statement to Mason into evidence, such error was harmless considering the admission of the victim's dying declaration to his cousin that was recorded on the 911 tape and petitioner's admission to a fellow prisoner that he committed the murder.

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[16] *Id.* at 243-244, See also, *Lilly v. Virginia*, 527 US 116, 125-126, 119 S Ct 1887, 144 L Ed 2d 117 (1999).

[17] *Crawford*, supra at 54, citing *State v. Houser*, supra at 438.

II.

A defendant's Sixth Amendment right to produce witnesses on his behalf is not limitless and may bow to accommodate other legitimate purposes. To prevent any adverse inferences against the defendant, to protect the constitutional rights of the witness, and to preserve a party's right to meaningful cross examination, Michigan precedent prevents parties from calling a witness to testify if that witness will assert a valid Fifth Amendment privilege on the stand. Does the Sixth Amendment prevent the State from enforcing its evidentiary rule?

Petitioner claims that the trial court denied him a fair trial by allowing Donald DeShazo to assert his privilege against self-incrimination. Petitioner further asserts that the trial court compounded the prejudice by excluding Deshazo's testimony completely rather than limiting his privilege to only potentially incriminating questions and compelling testimony on matters that would not be incriminating.

Petitioner's challenge is to the trial court's ruling under state evidentiary law that a court is forbidden to allow a witness to testify if it is obvious that the witness will assert a valid Fifth Amendment privilege. While it is true that state issues concerning the admission of evidence may be so fundamentally unfair as to deny the defendant due process, the trial court's decision here was not so prejudicial as to render a fair trial impossible. The Court should deny issue of the writ.

Petitioner wished to call DeShazo to rebut Derrick Green's testimony. Green testified that he spoke to petitioner while in jail and petitioner admitted he committed the murder. (6/7, 80-81) Petitioner anticipated that DeShazo, and another prisoner, Marcus Hill, would testify that they saw Green in

petitioner's cell going through copies of petitioner's discovery materials. (6/7, 4) The trial court conducted a hearing, outside the presence of the jury, to determine if DeShazo would claim the protection against self-incrimination. The prosecutor indicated to the court that DeShazo was charged with homicide along with two other men. One of the codefendants in that case had already been convicted, largely through the testimony of a jailhouse witness. (6/7, 5) Judge Teranes initially stated that any questions about the witnesses that potentially would be called at DeShazo's trial were not incriminating. The prosecutor added that he also intended to ask DeShazo about how his codefendant presented witnesses at his trial to show that the jailhouse witness stole discovery to fabricate his testimony. (6/7, 9) This was a similar tactic to what petitioner wished to do to combat Green's testimony. DeShazo's attorney stated that if the prosecutor asked any question about DeShazo's pending trial, then he would advise his client to invoke his right against self-incrimination. (6/7, 10-11) The trial court found that the prosecutor's questions would be relevant and proper cross examination but would potentially incriminate DeShazo. (6/7, 15) The trial court reasoned that, because the prosecutor had a right to ask his proposed questions which would require DeShazo to invoke his Fifth Amendment right to silence in front of the jury, the appropriate action was to exclude DeShazo from testifying. (6/7, 16)

No person shall be compelled to be a witness against himself in a criminal trial.[18] Testimony having even a possible tendency to incriminate is protected against compelled disclosure.[19] To invoke the privilege, the witness must show, at the very least, that he is faced with some

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[18]United States Constitution, Am. V; Const 1963, art 1, § 17.

[19] *Hoffman v. United States*, 341 US 479, 488, 71 S Ct 814, 95 L Ed 1118 (1951).

authentic danger of incrimination.[20] The trial court may compel the witness to answer a question only where the court can foresee, as a matter of law, that such testimony could not incriminate the witness.[21] However, a reply to a seemingly innocuous question may reasonably tend to sculpt a rung in the ladder of evidence leading to prosecution and allow invocation of the constitutional right.[22] The trial court recognized that DeShazo had a Fifth Amendment right in his own case not to say anything. DeShazo could not be compelled to testify, present evidence, or make any comment at all on the charges and witnesses against him at his own trial. This Fifth Amendment right extended to all matters prior to trial including any other proceeding where the witness is asked to give answers that might incriminate him in future criminal proceedings.[23] Because DeShazo's trial was still pending, his Fifth Amendment right in that case still applied. The trial court reasoned that, unless DeShazo waived his right, he was not required to answer any question pertaining to the proposed evidence that could be presented against him. (6/7, 13) The court further found that the prosecutor was permitted to ask about the pending trial because it dealt with a matter involving DeShazo's credibility at petitioner's trial. That Deshazo was biased against jailhouse witnesses because one would potentially testify against him at his own trial was a matter that affected his credibility. (6/7, 15) Because the prosecutor was free to ask his proposed cross examination questions and DeShazo was free to refuse to answer those

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[20] *Id.*, at 486.

[21] *Id.*

[22] *Id.*

[23] *Lefkowitz v. Turley*, 414 US 70, 77, 94 S Ct 316, 38 L Ed 2d 274 (1973); *McCarthy v. Arndstein*, 266 US 34, 40, 45 S Ct 16, 69 L Ed 158 (1924).

questions, Judge Teranes correctly held that a valid invocation of the Fifth Amendment would occur if DeShazo was allowed to testify. Having made this determination, the court's only option was to excuse DeShazo as a witness.[24]

The trial court properly excluded DeShazo's testimony entirely. Petitioner correctly asserts that the Fifth Amendment privilege is invoked on a question by question basis, not by a blanket refusal to testify. Petitioner is also correct that much of DeShazo's proposed testimony would not have been incriminating. Judge Teranes found that the entirety of DeShazo's direct examination would not be incriminating. Aside from a portion of the prosecution's cross examination, none of the testimony would allow DeShazo to assert a valid privilege. However, the fact remained that, at some point during his testimony, DeShazo was going to assert his privilege in front of the jury. Michigan has specifically forbid courts from allowing a witness to be called to testify when it knows that the witness will assert a valid privilege.[25] Petitioner's right to present DeShazo as a witness is not limitless and "may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process."[26] Allowing DeShazo to testify on direct examination but then assert his Fifth Amendment privilege on cross examination would have prevented the prosecution the right to test the truth of the testimony. The trial court made a clear finding that, if DeShazo took the stand, the prosecution would be allowed to ask him about his pending trial in order to impeach the credibility of the direct testimony. DeShazo, through his counsel, insisted that he would refuse to answer any question that dealt with his pending trial. Neither the defense nor the

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[24] *People v Paasche*, 207 Mich App 698, 707; 525 NW2d 914 (1994).

[25] Id.

[26] *Chambers v. Mississippi*, 410 US 284, 295, 93 S Ct 1038, 35 L Ed 2d 297 (1973).

prosecution is allowed to call a witness that will assert a Fifth Amendment privilege in front of the jury.[27] If a witness insists that he intends to proceed with asserting his privilege then the witness may not be called.[28] Here, DeShazo's attorney stressed that he would advise DeShazo not to answer any question concerning his pending trial but to instead assert his Fifth Amendment privilege. The trial court could not properly limit DeShazo's testimony to only those matters that would not incriminate him and would not require an invocation of the Fifth Amendment in front of the jury. The prosecution would have been allowed to explore DeShazo's bias and, when it did, DeShazo had the right to assert his privilege. To avoid the inevitable assertion of the privilege, and to preserve the prosecution's right to challenge the credibility of his testimony, DeShazo needed to be excluded as a witness.

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[27] *People v. Dyer*, 425 Mich 572, 580; 390 NW2d 645 (1986).

[28] *People v. Gearns*, 457 Mich 170, 202; 577 NW2d 422 (1998), overruled in part on other grounds, *People v. Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

III.

Alleged prosecutorial misconduct will not necessitate the reversal of a conviction unless the prosecutor's actions and comments denied the defendant a fair and impartial trial. Here, most of the prosecutor's alleged misconduct was quickly met by a defense objection and an instruction for the jury to disregard the prosecutor's comments. Was any misconduct by the prosecution mitigated to preserve a fair and impartial trial for petitioner?

There are no grounds for this Court to grant a petition of certiorari to review petitioner's claims of prosecutorial misconduct. The test of prosecutorial misconduct is whether the prosecutor's acts and comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."[29] No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction.[30] Nearly all of the alleged instances of prosecutorial misconduct were met by an objection from the defense and instructions to the jury to disregard the comment and decide the case on the evidence produced and not on the comments and arguments of the prosecutor.

In those instances where an objection was not made or instruction not given, the prosecutor's comment did not amount to a miscarriage of justice. Petitioner challenges the prosecutor's comment during cross examination that he doubted that petitioner was trying to help him. (6/9, 147) The

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[29] *Donnelly v. DeChristoforo*, 416 US 637, 643, 94 S Ct 1868, 40 L Ed 2d 431 (1974).

[30] *United States v. Carroll*, 26 F3d 1380, 1390 (CA 6, 1994).

prosecutor was frustrated that petitioner was repeatedly refusing to answer the question asked but, instead, offering his own narrative. The prosecutor interceded and asked petitioner to just answer the question and not ramble. (6/8, 147) Petitioner apologized and said that he was just trying to help. The prosecutor responded, " I doubt that, but just listen." (6/8, 147) The prosecutor's off-hand remark to petitioner's insistence on refusing to answer the questions was fleeting. The prosecutor made the comment and quickly returned to his questioning. Petitioner was not prejudiced at all by the comment much less prejudiced to the point that the remark denied him a fair trial.

Petitioner also challenges the prosecutor's argument that petitioner was a liar. (6/9, 14-15) The prosecutor's argument, that the evidence presented and petitioner's behavior on the witness stand showed that petitioner was a liar, was entirely proper. Here, the prosecutor did not call petitioner a liar just because he believed that petitioner was a liar. Rather, it was because the evidence proved that petitioner was lying. Prosecutors are accorded great latitude regarding their arguments and conduct. The prosecutor is entitled to comment on the evidence and to draw reasonable inferences therefrom. Comments on the credibility of witnesses, including the petitioner, are entirely proper.[31] These comments may be based on the evidence presented or the circumstances surrounding the testimony. The prosecutor's argument that petitioner was incredible was not improper.

The prosecutor's questions and comments did not, individually or collectively, deny petitioner a fair trial. In those brief instances that the prosecutor's actions veered from proper conduct, defense counsel and the court quickly stepped in to alleviate any prejudice that might have occurred.

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[31] *United States v. Owens*, 426 F3d 800, 806 (CA 6, 2005), cert. denied, __ US __, 126 S Ct 1089, 163 LEd2d 905 (2006).

Viewed in light of the strong evidence presented showing petitioner's guilt, especially the fact that the victim twice identified petitioner as the shooter and that petitioner himself admitted he killed the victim, no miscarriage of justice occurred.

IV.

Trial counsel is ineffective, denying his client's Sixth Amendment right to counsel, only if his performance was so deficient that it deprived the defendant of a fair and reliable trial. Here, trial counsel failed to make meritless objections to the admission of evidence and to harmless comments by the prosecutor. Did trial counsel's failure to make these frivolous objections deny petitioner a fair and reliable trial?

Petitioner's claim of ineffective assistance of counsel does not merit review by this Court. Petitioner is guaranteed the right to effective assistance of counsel at trial. [32] In claiming that his right to counsel was violated, petitioner has the heavy burden of showing: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the attendant proceedings were fundamentally unfair or unreliable.[33] Substantial prejudice to petitioner's ability to defend himself is a requirement. If petitioner was provided with a true adversarial criminal trial, no ineffective assistance of counsel claim will survive, even if defense counsel made demonstrable errors. [34] The objective standard of

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[32]US Const, Ams VI, XIV; Const 1963, art 1, § 20.

[33]*Strickland v. Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984).

[34]*United States v. Cronic*, 466 US 648, 666, 104 S Ct 2039, 80 L Ed 2d 657 (1984).

reasonableness does not require counsel to be perfect.[35] "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect."[36]

Petitioner claims that Bullock was ineffective for failing to object to the admission of the victim's dying declarations and for not objecting to some of the incidents of alleged prosecutorial misconduct.

Bullock was not ineffective regarding the admission of the victim's dying declarations. Petitioner claims that Bullock should have cited *Crawford* as a ground for excluding the statements. As previously shown, the victim's statement to Mason was admissible under MRE 804(b)(2) as a dying declaration. Neither *Crawford* nor the Sixth Amendment prohibit the victim's dying declaration from being admitted and considered by the jury. Bullock cannot be ineffective for failing to present a frivolous and meritless objection.

The victim's first statement was made to his cousin, Monica Bowen, in response to her question about who was the shooter. Although the dying declaration was recorded by the 911 operator, it was made to someone who was not a police officer and was made to address the emergency situation of the victim being shot. The declaration was nontestimonial. The victim's second statement was given to a police officer but the circumstances were not akin to the type of "testimonial" situations mentioned in *Crawford* and *Davis*. Bullock could not claim that *Crawford* applied to either declaration. Bullock was not ineffective for failing to make a frivolous challenge to the admissibility of the victim's statements under *Crawford*.

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[35]*Mason v. Mitchell*, 320 F 3d 604, 617 (CA 6, 2003).

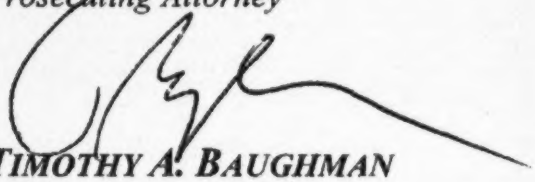
[36]*Kimmelman v. Morrison*, 477 US 365, 374, 106 S Ct 2574, 91 L Ed 2d 305 (1986).

Bullock was also not ineffective for failing to object to some of the alleged incidents of prosecutorial misconduct. Of the several incidents of misconduct cited by petitioner, the only ones that Bullock did not object to were either minor and fleeting or proper argument by the prosecutor. None of the unobjected to incidents denied petitioner a fair trial. A miscarriage of justice is required for any claim of prosecutorial misconduct and for any claim of ineffective assistance of counsel. Petitioner has failed to show either that Bullock committed professional error or that his right to a fair trial was denied.

RELIEF

WHEREFORE, this Court should deny certiorari in this matter.

KYM L. WORTHY
Wayne County
Prosecuting Attorney



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